120-4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1199. (+12.00 written)

ALBERT S. ROSENBAUM, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 16, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1199.

ALBERT S. ROSENBAUM, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Transcript from State court	1	1
Complaint	1	1
Affidavit of Geo. Lezinsky	27	11
Summons	28	11
Petition for removal	32	12
Bond for removal	35	13
Order for removal	38	14
Clerk's certificate	39	15
Demurrer	41	15
Notice of motion to remand	44	17
Order remanding cause	46	17
Certificate to judgment roll	48	18
Opinion	50	18
Bond	57	20
Clerk's certificate	61	22
Writ of error	63	22
Citation	66	23
Proof of service of citation	67	23

JUDD & DETWEILER, PRINTERS, WASHINGTON.

Complaint.

1 In the Superior Court of the City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, Plaintiff,

vs.

THE BOARD OF SUPERVISORS of the City and County of San Francisco, Defendant.

The plaintiff above named complains of the defendant above named, and, for cause of action, avers:

I.

The plaintiff is a citizen of the State of New York.

II.

The defendant is, and during all the times hereinafter stated was, the Board of Supervisors of the City and County of San Francisco.

III.

On the first day of April, 1872, the Legislature of the State of California passed an Act entitled: "An Act to open and establish a public street in the City and County of San Francisco, to be
2 called 'Montgomery Avenue,' and to take private lands therefor."

IV.

Thereafter, the owners of a majority in frontage of the property described in Section four of said Act, as said owners are and were named in the then last preceding annual assessment-roll for the State, City and County taxes, did petition the then Mayor of said City and County, in writing, for the opening of Montgomery Avenue, according to the provisions of said Act. Said written petition was presented to said Mayor, in the month of June, A. D. 1872; and it, upon its face, purported to be, and stated that it was, and it, in fact, was, signed by the owners of a majority in frontage of the property described in Section four of said Act, as said owners were named in the then last preceding annual assessment-roll for said State, City and County taxes. On the 19th day of June, 1872, the then Mayor of said City and County, William Alvord, affixed to said petition his certificate in writing, signed by him in his said official capacity, and bearing the seal of said City and County, which said cer-
3 tificate is in the words and figures following, to wit:

"SAN FRANCISCO, June 19th, 1872.

"MAYOR'S OFFICE,

"*City and County of San Francisco.*

"I, William Alvord, Mayor of the City and County of San Fran-
"cisco, do hereby certify that the foregoing petition, accompanied by
"the certificates of R. H. Stretch, Surveyor of the City and County

"of San Francisco, and Alexander Austin, Tax Collector of said City "and County of San Francisco, was presented to me, and I find the "same to be in all respects in due form, and that the signatures, on "said petition, are the *bona fide* signatures of the parties repre- "sented, and that they, and each of them, claim to own and hold "said property signed for by them, and each of them, as appears "on the assessment roll of the last preceding annual assessment, "and also as appears by their said signatures, and that such peti-
"tion represents over a majority in frontage of the property
4 "described in Section four of the Act of the Legislature of
"the State of California entitled 'An Act to open and es- "tablish a public street in the City and County of San Francisco, "to be called Montgomery Avenue, and to take private lands there- "for,' approved April 1, 1872, and also a majority in frontage, as "appears by the last preceding annual assessment roll for the State, "City and County taxes, being for the fiscal year of 1871-1872.

"It is, therefore, by me ordered that the Board of Public Works, "as created by Section nineteen of said Act above named, proceed "to organize by the election of a President.

"Witness my hand and official seal the nineteenth day of June, "A. D. 1872.

"[SEAL OF THE CITY AND COUNTY OF SAN FRANCISCO.] WILLIAM ALVORD,

"Mayor of the City and County of San Francisco."

Thereafter, on the 20th day of June, 1872, said Mayor, and the then City and County Surveyor, and the then Tax Collector
5 of said City and County, met together as the Board of Pub- lic Works, named in said Act, and did make and enter, and cause to be entered upon the official record book of the proceed- ings of said Board of Public Works, the following entry, to wit:

"Be it remembered, that on the eighteenth day of June, A. D. "1872, at the Mayor's Office, in the City Hall, in the City and "County of San Francisco, it appearing that the owners of more "than a majority in frontage of all the property described in Sec- "tion four of the Act of the Legislature of the State of California "entitled 'An Act to open and establish a public street in the City "and County of San Francisco, to be called Montgomery Avenue, "and to take private lands therefor,' approved April 1, 1872, and also, "as said owners are named in the last preceding and the last annual "assessment roll for the State, City and County taxes, being for the "year 1871-1872, did petition William Alvord, Mayor of said City
"and County of San Francisco, in writing, for the opening
6 "of Montgomery Avenue, according to the provisions of the
"said Act of the Legislature last above named, which pe- "tition is in words and figures following, to wit:"

(Here in said record book is copied at length the petition herein- above referred to, together with the hereinabove mentioned certifi- cate of said Mayor.)

"Whereupon on the twentieth day of June, A. D. 1872, at the

"City Hall, in the City and County of San Francisco, said Board of "Public Works, composed of William Alvord, Mayor of the City "and County of San Francisco, Alexander Austin, Tax Collector of "the City and County of San Francisco, and R. H. Stretch, Sur- "veyor of said City and County of San Francisco, proceeded and "did organize by electing

"WILLIAM ALVORD, President thereof,
"and H. S. TIBBEY, Secretary thereof,
"and M. M. ESTEE, Attorney for said Board."

Thereupon, said Board of Public Works, on said 20th day
7 of June, 1872, did organize by electing said Mayor President of said Board; and caused the aforesaid certificate, relating to said petition, to be spread upon the official record-book of their proceedings as such Board of Public Works.

V.

After their organization aforesaid, said Board of Public Works did make a written report, in conformity to and in accordance with the provisions of Section six of said Act. Said report was signed by all the members of said Board. Said report was completed on the 26th day of September, A. D. 1872. Said report was left at the office of said Board, in the City and County of San Francisco, daily, during ordinary business hours, for thirty days from the 26th day of September, A. D. 1872, for the free inspection of all parties interested; and notice that the same was so open for inspection for such time and such place was published by said Board, daily, for twenty days, in two daily newspapers printed and published
8 in said City and County, the first of said publications being on said 26th day of September, A. D. 1872.

VI.

No application by petition or otherwise having been made by any person to the County Court of the City and County of San Francisco, setting forth any objection to said report, said Board did, on the 2d day of November, A. D. 1872, present said report to said Court, with a petition to said Court that the same be approved and confirmed by said Court. Such proceedings were thereupon had in said Court, that thereafter, to wit: on the 14th day of November, 1872, an order was by said Court duly given, made and entered on its minutes, approving and confirming said report. In said order, said Court does in express words and terms adjudge and decree that, under and pursuant to the provisions of Section five of said Act, on the 18th day of June, 1872, the actual owners of more than
9 a majority in frontage of the property described in Section four of the said Act, and the owners of more than a majority in frontage of the property described therein, as the same are named or appeared on the last preceding annual assessment roll for the State, City and County taxes for the City and County of San Francisco, petitioned his Honor, Wm. Alvord, the Mayor of said

City and County of San Francisco, in writing, requesting and demanding the opening of said Montgomery Avenue, according to the provisions of said Act; that all the proceedings taken therein were duly and legally taken; that each and all of the acts, matters, and things provided by said Act to be done and performed by said Board of Public Works in the premises have, on the part of said Board, been duly and regularly done and performed in the form, at the times, and in the manner prescribed by said Act.

No appeal was ever taken by any person from said order of
10 said Court, and the said order, from the entry thereof, has remained and still remains in full force and effect.

VII.

After the order of the County Court aforesaid, and in pursuance of and conformity with the provisions of said Act, said Board of Public Works did execute one thousand five hundred and seventy-nine bonds, in the sum of one thousand dollars each, aggregating in all $1,579,000. Said bonds were dated January 1st, 1873, and were, upon their face, made payable in thirty years from their date, unless sooner redeemed as in the aforesaid Act provided, and bore interest at the rate of six per cent. per annum, payable semi-annually at the office of the Treasurer of said City and County of San Francisco.

To each of said bonds sixty coupons, for the interest thereon, at the rate aforesaid, and payable as aforesaid, were attached.
11 Said bonds were, and each of them was, signed by all the members of said Board of Public Works, and to each of them was affixed the seal of said Board of Public Works. Each of said coupons was signed by the President of said Board of Public Works. Said amount of bonds, to wit: $1,579,000, was the amount necessary to pay and discharge all the damages, cost and expenses arising from or incidental to the opening of said avenue as fixed and determined by the final confirmation aforesaid of the report aforesaid.

VIII.

On the 28th day of November, A. D. 1872, the Mayor, Auditor and Treasurer of said City and County of San Francisco, in pursuance of the provisions of the aforesaid Act, caused to be published—and said publication was continued daily for a period of sixty consecutive days thereafter—in four daily newspapers, published in said City and County of San Francisco, to wit:
12 *Daily Alta California*, *Evening Bulletin*, *Morning Call* and *San Francisco Chronicle*, the following advertisement, to wit:

"Montgomery Avenue Bonds. Sealed proposals will be received at the office of the Treasurer of the City and County of San Francisco, State of California, City Hall, San Francisco, until Tuesday, January 28th, 1873, at 12 o'clock noon, for the purchase of Montgomery Avenue Bonds, authorized to be issued by the Board of Public Works of said City and County, as provided by an Act of the Legislature of the State of California, entitled an Act to open and

establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor, approved April 1st, 1872.

"Said bonds are of the denomination of $1,000 each, payable in thirty years from January 1st, 1873, and bear interest at the
13 rate of six per cent. per annum, payable semi-annually, on the first day of July and the first day of January of each year, at the office of the Treasurer of the City and County of San Francisco. Interest coupons are attached to each bond, and are, at the option of the holder, receivable in payment of all taxes levied under said Act. Principal and interest are payable in gold coin of the United States of America.

"The Act provides for a sinking fund. The damages to be paid for the opening of the avenue amount to the sum of $1,244,737 $\frac{38}{100}$, as ascertained and certified by decree final, on the 14th of November, 1872.

"The property liable under said Act and Decree for the payment of the bonds, principal and interest, is assessed, for the purpose of general taxation for the present fiscal year, at sixty-five millions of dollars, ($65,000,000), and said property stands pledged for
14 the redemption of these bonds.

"Bonds at par, to the amount of one hundred and fifty-eight thousand dollars, ($158,000), have already been accepted by and delivered to parties damaged, leaving one million eighty-six thousand seven hundred and thirty-seven $\frac{38}{100}$ dollars ($1,086,737 $\frac{38}{100}$), to be provided for by the sale of bonds.

"Parties damaged have a preference over other bidders where the bids are at the same rate, to the extent of their assessed damages. Bidders will state the rate per cent. at which they will purchase any portion of said bonds, payable in gold coin of the United States, and each bid must be accompanied by a bond (except from bidders entitled to damages) satisfactory to the Mayor, Auditor and Treasurer, conditional that if any award be made, the terms of the bid will be complied with.

"Bids must be addressed to the Mayor, Auditor and
15 Treasurer of the City and County of San Francisco, City Hall, San Francisco, California, and endorsed 'Proposals for the purchase of Montgomery Avenue Bonds.'

"The Mayor, Auditor and Treasurer reserve the right to reject any and all unreasonable bids.

"Dated at the City Hall, San Francisco, November 27th, 1872.

WM. ALVORD,
Mayor of the City and County of San Francisco,
MONROE ASHBURY,
Auditor of the City and County of San Francisco,
JOHN A. BAUER,
Treasurer of the City and County of San Francisco."

In pursuance of said advertisement, the bonds hereinafter mentioned were, among others, sold and disposed of, for a valuable consideration in money paid by the purchaser, by said Mayor, Treas-

urer and Auditor, and the purchase price thereof was paid to
16 said Treasurer, and by him placed in the "Montgomery Avenue Fund," created by Section ten of the Act of the Legislature hereinabove referred to.

IX.

The sum of money paid out of the General Fund of the Treasury of the City and County of San Francisco, under and in pursuance of an Act entitled "an Act to repeal an Act entitled an Act to make, open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor," approved March twenty-ninth, eighteen hundred and seventy, and to provide for the payment of the expenses incurred under said Act, approved March first, eighteen hundred and seventy-two, was not deemed or held by said Board of Public Works, nor by said County Court, to constitute a part of the cost of said
17 Montgomery Avenue, nor was the same included in the report of said Board as finally approved and confirmed by said Court as aforesaid, nor was any part of the money raised by the sale of Montgomery Avenue bonds, as aforesaid, paid into the General Fund of said City and County for the purpose of restoring the sum of money thus paid out, nor for any purpose whatever, nor at all.

X.

After the sale of the Bonds aforesaid, said Board of Public Works caused said Montgomery Avenue to be opened in conformity with the provisions of said Act, and did pay in full all damages and liabilities fixed by the final report of said Board, as approved and confirmed as aforesaid, and did receive from the parties
18 entitled thereto proper conveyances to the City and County of San Francisco, for all property taken for the opening of said avenue under the provisions of said Act.

Thereafter, to wit: on the twenty-first day of September, 1874, said Board of Public Works did transfer the said avenue so opened, and the possession and control thereof, to the municipal authorities of said City and County of San Francisco, to be forever used as an open public street; said municipal authorities thereupon took and accepted said avenue as an open public street, and caused the same to be sewered, graded, sidewalked, planked and paved in accordance with the rules, regulations, statutes and ordinances applicable to the other public streets of the City and County of San Francisco; and said avenue has ever since been maintained and kept by said municipal authorities in accordance with said rules, regulations, statutes and ordinances as a public street of said city and county; and said avenue ever since has been, and now is, used as an open, public street of said city and county; and the title thereto has been, and now is vested in said city and county
19 for said purpose forever, as the title of other public streets in said city and county is vested. The length of the avenue so opened is 6,226 feet.

XI.

At the sale of said bonds hereinabove mentioned, parties purchased as aforesaid, in good faith and for a valuable consideration and without notice of any defect therein, twenty-one of said bonds, numbered respectively as follows:—

212, 213, 214, 215, 216, 217, 218, 219, 999, 1,000, 1,001, 1,002, 1,003, 1,004, 1,005, 1,006, 1,008, 1,233, 1,234, 1,235 and 1,520, and all coupons of interest then unpaid thereon. Which bonds are all, with the exception of the numbers thereof, in the words and figures following:—

"State of California, United States of America.

"Board of Public Works, City and County of San Francisco,

"$1,000. Number..... $1,000.

"Montgomery Avenue bond, in conformity with an Act passed by the people of the State of California, represented in Senate and Assembly, entitled 'An Act to open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor,' approved April 1, 1872.

"The Treasurer of the City and County of San Francisco, State of California, will pay at his office, in said city and county, to the bearer hereof, one thousand dollars in United States gold coin, with interest at the rate of six per cent. per annum, payable semi-annually, in like gold coin, upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents.

"It being understood and agreed that this bond may be redeemed by said Treasurer as provided in said above mentioned Act of the Legislature of the State of California.

"In witness whereof, the Mayor, the Tax Collector, and City and County Surveyor of said City and County of San Francisco, composing a Board of Public Works, have respectively signed these presents, and the President of the Board of Public Works has signed the annexed coupons as of the first day of January, 1873.

[Seal of the Board of Public Works.]

WILLIAM ALVORD,
President of the Board of Public Works, and
Mayor of the City and County of San Francisco.

ALEXANDER AUSTIN,
Tax Collector and Member of said Board of Public Works.

RICHARD H. STRETCH,
City and County Surveyor, and Member of said Board of Public Works."

XII.

Plaintiff has been, ever since the purchase hereinabove mentioned, and still is, the owner and holder of said twenty-one bonds

and of coupon number eighteen, and of all the other coupons subsequent in number originally and still attached to each of the bonds aforesaid, having purchased the same in good faith, for a valuable consideration, and without notice of any defect therein.

Said coupons, with the exception of the numbers thereof and of the bonds marked thereon, are all in the following words, to wit:

$30. Board of Public Works. Coupon No....
Montgomery "The Treasurer of the City and County
23 M. A. B. "of San Francisco will pay bearer, at his
Ave. Bond. "office, thirty dollars. Six months interest.
On Bond No ... "WILLIAM ALVORD,
"President of Board of Public Works."
Due.....

Said coupons, number eighteen and following, are for the interest on said bonds, due respectively on the first day of January, 1882, and the first day of every sixth month.

XIII.

Said coupons have not, nor has any one of said coupons, nor any part thereof, nor the money due thereon, ever been paid. There are no funds in the hands of the Treasurer of the City and County of San Francisco applicable to the payment of said coupons or any one thereof.

On the first Monday of October, A. D. 1885, the Board of Supervisors of the City and County of San Francisco duly assembled for
24 the purpose of levying the State and city and county taxes upon the taxable property of said city and county. While said Board was so assembled, said plaintiff appeared before said Board and produced and exhibited the bonds aforesaid, and did demand of said Board that they do levy in the same manner as other taxes are levied in said city and county, a tax upon the lands described in section four of the Act hereinabove mentioned, sufficient to pay the interest coupons aforesaid, to wit: Coupons numbers eighteen and following. And also a tax of one per cent. upon each one hundred dollars valuation upon the same lands, according to the enhanced values of the respective parcels of land as fixed in the aforesaid final report of the aforesaid Board of Public Works, as confirmed by the Court aforesaid. Said Board then and there failed, neglected and refused, and ever since has and still does fail, neglect and refuse to levy said tax.

Wherefore, plaintiff prays judgment against said Board
25 of Supervisors, commanding them to levy the tax hereinabove mentioned, and to continue to levy said tax from year to year until all the interest upon said bonds, and said bonds themselves, are fully paid.

D. M. DELMAS,
Attorney for Plaintiff.

A. L. RHODES AND J. P. HOGE,
Of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

Joseph Brandenstein, being first duly sworn, doth depose and say: That he is the agent of the above-named plaintiff, Albert S. Rosenbaum, in the State of California; that said plaintiff is absent from said State; that the facts stated in the foregoing com-
26 plaint are within the knowledge of affiant, and, therefore, he makes this verification; that the foregoing complaint is true of affiant's own knowledge.

J. BRANDENSTEIN.

Subscribed and sworn to before me, this tenth day of December, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

[Endorsed.] Filed December 11th, 1885.
JAS. J. FLYNN, Clerk,
By E. P. CASSERLY, Deputy Clerk.

27 STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

George Lezinsky, being duly sworn, deposes and says: That he is and was, at and before the several times hereinafter mentioned, a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco and not a party to the within entitled action and competent to be a witness on the trial thereof; that on the eleventh day of December, 1885, he served the annexed summons on the defendant, the Board of Supervisors of the City and County of San Francisco, by delivering personally to and leaving with Washington Bartlett, as Mayor of the said City and County of San Francisco, and as President of Board of Supervisors of the City and County of San Francisco, said defend-
28 ant at the City and County of San Francisco, a copy of said summons, attached to a copy of the complaint in said action.

GEO. LEZINSKY.

Subscribed and sworn to before me, this twelfth day of December, 1885.

[SEAL.] LEE D. CRAIG, *Notary Public.*

Summons.

Department No. 6.
In the Superior Court, City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, Plaintiff, *vs.* THE BOARD OF SUPERVISORS of the City and County of San Francisco, Defendant.	Action brought in the Superior Court, City and County of San Francisco, State of California, and the complaint filed in said City and County of San Francisco, in the office of the Clerk of said Superior Court.

The People of the State of California send greeting to The
29 Board of Supervisors of the City and County of San Francisco, defendant. You are hereby required to appear in an action brought against you by the above named plaintiff, in the Superior Court, City and County of San Francisco, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service), after the service on you of this summons—if served within this county; or if served elsewhere, within thirty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover judgment against you, the Board of Supervisors of the City and County of San Francisco, commanding you to levy, in the same manner as other taxes are levied in said city and county, a tax upon the lands described in section four of an Act of the Legislature of the State of California, enti-
30 tled "An Act to open and establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue and to take private lands therefor," approved April 1, 1872, sufficient to pay the interest coupons set forth in the complaint herein; and also a tax of one per cent. upon each one hundred dollars valuation upon the same lands, according to the enhanced values of the respective parcels of land as fixed in the final Report of the Board of Public Works, as confirmed by the County Court, and to continue to levy said tax from year to year until all the interest upon said bonds, and said bonds themselves, are fully paid; all of which is more particularly set forth in the complaint on file herein, to which your attention is particularly directed, and for costs of suit.

And you are hereby notified that if you fail to appear and
31 answer the said complaint, as above required, the said plaintiff will apply to the Court for the relief demanded in the complaint.

Given under my hand and seal of the said Superior Court, at the City and County of San Francisco, State of California, this eleventh day of December, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.]

JAS. J. FLYNN, *Clerk*,
By E. P. CASSERLY, *Deputy Clerk*.

[Endorsed.] Filed December 21st, 1885.

JAS. J. FLYNN, *Clerk*.
By D. J. GORDON, *Deputy Clerk*.

Petition.

32 In the Superior Court of the City and County of San Francisco, State of California—Department No. 6.

ALBERT S. ROSENBAUM, Plaintiff, *vs.* THE BOARD OF SUPERVISORS of the City and County of San Francisco, Defendant.	Petition for removal, etc., to the Circuit Court of the U. S., Ninth Circuit, District of California.

To the said Superior Court:—

Your petitioner, Albert S. Rosenbaum, plaintiff above named, respectfully shows to this Honorable Court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that petitioner was at the time of the commencement of this suit, and still is, a citizen of the State of New York,
33 and that defendant was then and still is the Board of Supervisors of the City and County of San Francisco, in said State of California.

And your petitioner offers herewith a bond, with good and sufficient sureties, for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the sureties and bond, and to cause the record herein to be removed into said Circuit Court of the United States, Ninth Circuit, in and for the District of California, and he will ever pray.

D. M. DELMAS,
34 *Attorney for Plaintiff.*

STATE OF CALIFORNIA, } ss.
City and County of San Francisco. }

I, D. M. Delmas, being duly sworn, do say that I am the attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, I verily believe.

D. M. DELMAS.

Subscribed by the said D. M. Delmas, in my presence, and by him sworn to before me, this 21st day of December, 1885.

[SEAL.] LEE D. CRAIG, *Notary Public.*

Endorsed: Filed December 21, 1885. Jas. J. Flynn, Clerk. By D. J. Gordon, Deputy Clerk.

Bond on Removal.

Know all men by these presents, that I, Albert S. Rosenbaum, principal, and Charles Sutro and Gustav Sutro, as sureties,
35 are held and firmly bound unto the Board of Supervisors of the City and County of San Francisco in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto the said the Board of Supervisors of the City and County of San Francisco, their successors and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Albert S. Rosenbaum having petitioned the Superior Court of the City and County of San Francisco, State of California, for the removal of a certain cause therein pending, wherein said Albert S. Rosenbaum is plaintiff, and the Board of Supervisors of the City and County of San Francisco, is defendant, to the Circuit Court of the United States, Ninth
36 Circuit, in and for the District of California: Now if the said Albert S. Rosenbaum, said petitioner, shall enter in said Circuit Court, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court, if said Court shall hold said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and effect.

Witness our hands and seals this 21st day of December, A. D. 1885.

ALBERT S. ROSENBAUM, [L. S.]
By J. BRANDENSTEIN, his attorney in fact.
CHARLES SUTRO. [L. S.]
GUSTAV SUTRO. [L. S.]

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

We, Charles Sutro and Gustav Sutro, of said city and county, the sureties named in the foregoing bond, being duly sworn, do each for himself depose and say, that I am a resident of the State of California, and a property-holder therein; that I am worth the sum of one thousand dollars over and above all my debts and lia-
37 bilities, and exclusive of property by law exempt from execution; that I have property in the State of California liable to execution of the value of more than one thousand dollars.

CHARLES SUTRO. [L. S.]
GUSTAV SUTRO. [L. S.]

Subscribed and sworn to before me, this 21st day of December, 1885.

[SEAL.] LEE D. CRAIG, *Notary Public.*

Endorsed: Filed December 21st, 1885.

JAS. J. FLYNN, *Clerk*,
By D. J. GORDON, *Deputy Clerk.*

Order Removing Cause.

38 In the Superior Court of City and County of San Francisco, State of California—Department No. 6.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.

Order of Removal.

The said plaintiff having filed in this Court his petition for the removal of the above-entitled cause to the Circuit Court of the United States, Ninth Circuit, District of California, and having offered therewith a bond with sureties for his entering in said Circuit Court, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold this action was wrongfully or improperly removed thereto, it is now ordered that the said bond be and the same hereby is approved; and the said petition being now considered by the Court, it is further ordered that said action be removed to said Circuit Court, and that the Clerk of this Court certify to said Circuit Court all the records and proceedings in said action in this Court.

M. A. EDMONDS,
Done this 21st day of December, 1885. *Judge.*

Clerk's Certificate.

I, Jas. J. Flynn, County Clerk of the City and County of San Francisco, State of California, and *ex-officio* Clerk of the Superior Court of said city and county, do hereby certify the foregoing to be a full, true and correct copy of the whole of the record in the within action of Albert S. Rosenbaum *vs.* The Board of Supervisors of the City and County of San Francisco, now on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court, this 22d day of December, 1885.

JAS. J. FLYNN,
[SEAL.] *County Clerk and ex-officio Clerk of the Superior Court,*
By D. J. GORDON, *Deputy Clerk.*

Endorsed: Filed December 21, 1885. Jas. J. Flynn, Clerk, by D. J. Gordon, Deputy Clerk.

In the Circuit Court of the United States, for the District of California.

Copy of record filed December 31, 1885.
L. S. B. SAWYER, *Clerk.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendant. } Demurrer.

The defendant demurs to the complaint of the plaintiff in the above-entitled action, and to each separate count herein contained, on the

following grounds and for the following causes appearing on the face thereof:

I.

The Court has no jurisdiction of the person of the defendant.

II.

The Court has no jurisdiction of the subject of the action.

III.

There is a defect of parties defendant in this, that the City
42 and County of San Francisco should have been made a party defendant.

IV.

Several causes of action have been and are improperly united in the said complaint—action upon the several and separate coupons counted upon in this—that it appears that upon each of the several coupons counted upon in the said complaint, there arises a several and separate cause of action, which is counted upon and attempted to be set forth, but is not separately stated in said complaint.

V.

That said complaint does not state facts sufficient for a cause of action against this defendant.

VI.

That said complaint does not state facts sufficient to constitute a cause of action in this—that the cause of action set forth in said complaint is barred by the provisions of section three hun-
43 dred and thirty-seven of the Code of Civil Procedure of the State of California; also by the provisions of subdivision of section three hundred and thirty-eight of said Code; also by the provisions of sub-division one of section three hundred and thirty-nine of said Code; also by the provisions of section three hundred and forty-two of said Code; also by the provisions of section three hundred and forty-three of said Code.

Wherefore defendant prays to be hence dismissed with its costs.

JOHN L. LOVE,
City and County Attorney,
Attorney for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN L. LOVE,
City and County Attorney.

Endorsed: Service by copy of within original is hereby admitted this ninth day of January, A. D. 1886.

D. M. DELMAS,
Attorney for Plaintiff.

Filed January 9, 1886.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

Notice of Motion to remand Cause.

44 In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
THE BOARD OF SUPERVISORS of the City and County of San Francisco, Defendant. } No. 3,933.

To the above-named Plaintiff and D. M. Delmas, Esq., his attorney.

You will please take notice that on Monday, the 15th day of February, 1886, at 11 o'clock A. M., or as soon thereafter as counsel can be heard in the Court-room of the above Court, in the City and County of San Francisco, motion will be made on behalf of this defendant to remand this cause to the Superior Court of the City and County of San Francisco, State of California, on the
45 ground of want of jurisdiction by this Court of the subject matter contained in the complaint. Upon the hearing of said motion, reference will be made to this notice and to the documents and papers on file in this cause.

Dated San Francisco, this 2d day of February, 1886.

JOHN L. LOVE,
City and County Attorney,
Attorney for Defendant.

Endorsed: Service by copy of within original is hereby admitted this 2d day of February, A. D., 1886.

D. M. DELMAS,
Attorney for Plaintiff.

Filed February 2d, 1886. L. S. B. Sawyer, Clerk, by F. D. Moncton, Deputy Clerk.

Order Remanding Cause.

46 At a stated term, to-wit: the February term, A. D. 1886, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the District of California, held at the Courtroom in the City and County of San Francisco, on Monday, the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Present—The Honorable Lorenzo Sawyer, Circuit Judge.

A. S. ROSENBAUM,
vs.
THE BOARD OF SUPERVISORS of the City and County of San Francisco. } No. 3,933.

This cause, heretofore argued and submitted to the Court for consideration and decision upon the motion to remand same to the Superior Court of the City and County of San Francisco, State of California, having been duly considered, it is ordered that
47 said motion be and the same hereby is granted, and said cause remanded to the said Superior Court of the City and County of San Francisco.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said Circuit Court, this twenty-fourth day of May, 1886.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk*.

Endorsed: Filed May 24th, 1886. L. S. B. Sawyer, Clerk. By F. D. Moncton, Deputy Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA.

48 In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

A. S. ROSENBAUM,
vs.
THE BOARD OF SUPERVISORS of the City and County of San Francisco. } No. 3,933.

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, within and for the District of California, do hereby certify that the foregoing papers hereto annexed constitute the roll in the therein entitled action.

Witness my hand and the seal of said Circuit Court, this twenty-fourth day of May, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk*.

49 Endorsed: Roll. Filed May 24th, 1886. L. S. B. Sawyer, Clerk, by F. D. Moncton, Deputy Clerk.

Opinion.

50 In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

A. S. ROSENBAUM,
vs.
THE BOARD OF SUPERVISORS of the City and County of San Francisco. } No. 3,933.

May 24, 1886.

Before Sawyer, Circuit Judge. A. L. Rhodes, for petitioner; Jno. Lord Love, for respondent.

Sawyer, Circuit Judge: This Court has no jurisdiction to entertain an application for a mandamus originally presented therein, except as ancillary to some other proceeding, establishing the demand and reducing it to judgment, and in the nature of process for executing such judgment. *Liebmann* vs. *San Francisco*, 24 Fed. R., 713, 722; *McIntire* vs. *Wood*, 7 Or., 505; *Bath County* vs. *Amy*, 13 Wall., 247–8; *Graham* vs. *Norton*, 15 Wall., 428; *County of Greene*

vs. *Daniel*, 102 U. S., 195; *Davenport* vs. *Dodge Co.*, 105 U. S.
51 242. Can jurisdiction be conferred upon the Court by commencing the proceeding in the State Court, which has jurisdiction in this form of proceeding, and then removing it to this Court under the Act of 1875? I am satisfied that it cannot. The case of *Claflin* vs. *Com. Ins. Co.*, 110 U. S., 81, 89, relied on by the petitioner, does not reach the case. In that case the decision was rested expressly on the ground that Section 2, of the Act of 1875, is broader than Section one, since it contains no such limitation as to the right of an assignee to sue in the National Courts as is found in Section one. In the case now under consideration, the language, "any suit of a civil nature at law, or in equity," in the second section is no broader than the language, "all suits of a civil nature at common law, or in equity," in Section one. If, therefore, Section one does not embrace this case, Section two, for like reasons, does not embrace it, and cannot give jurisdiction by removal. That Section one does not embrace the case, is clear from the cases already cited, otherwise the Court would have jurisdiction as an original
52 proceeding instituted in this Court. Therefore, Section two does not reach it, or authorize a removal. A mandamus is not "a suit of a civil nature at law, or in equity," within the meaning of the Act. Jurisdiction to issue writs of mandamus is not derived from Section 1, of the Act of 1875, and it was not derived from the corresponding provisions of the Act of 1789, being Section 11 of that Act. This jurisdiction rests upon the provisions of Section 716; the section upon this point corresponding to Section 14, of the Act of 1789. This point is expressly settled by the Supreme Court in *Bath County* vs. *Amy*, 13 Wal., 248. If not a suit of a civil nature within the meaning of the Act of 1789, it cannot be one within the meaning of the same language in the Act of 1875. A mandamus, therefore, is not a suit of a civil nature, within the meaning of any provision of the Act of 1875, and is not removable under it.

53 So, also, under the Code of Civil Procedure of California, a mandamus is not regarded as a civil action in THE ORDINARY SENSE of that term. "Remedies are divided into two classes: 1. Actions; 2. Special proceedings." Code Civil Proc., 21. Sections 22 and 23 define these remedies: "An *action* is an *ordinary* proceeding in a Court of Justice, by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Sec. 22. *Every* other remedy is a "special proceeding." See, also, Sections 307, 1063. A mandamus is defined by Section 1034, and it can only be issued "where there is not a plain, speedy and adequate remedy in the *ordinary course* of law." Sec. 1086. It is issued only upon affidavit. Sec. 1087. Thus, under the California Code, a mandamus is not regarded as an action at law, or a suit in equity, in the ordinary sense in which those terms are used; but as a special proceeding, to afford a remedy where there is not a plain,
54 speedy and adequate remedy, "in the *ordinary* course of law." Much less is it "an action at law, or a suit in equity," within

the provisions of either sections of the Act of Congress of 1875, under which the Courts have no jurisdiction of the writ, except where employed as ancillary to some other remedy, in the nature of an execution, to carry a judgment in some action into effect.

It may well be doubted, also, whether the case is a suit "of a civil nature where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," within the meaning of the removal Act. It is not a suit to recover a judgment. There is no *ad damnum* clause in the petition, and no prayer for a money judgment. No ascertainment of value is sought to be had. It is not a proceeding against the City of San Francisco, or any corporation, or person alleged to be liable for any money demand whatever. It is
55 merely a proceeding against certain officers personally, in their official capacity, who, it is alleged, refuse to discharge a public duty imposed upon them by law, for the purpose of setting them in motion—a proceeding to compel them to act to discharge an official duty. If the writ issues, it will of itself alone afford no remedy. When respondents act, only one step towards a remedy is made. The machinery is only started. If a tax is levied and raised, other actions may be necessary to establish the right, and other proceedings by mandamus against other officers may be necessary to obtain a remedy. In *Kurtz* vs. *Moffitt*, 115 U. S., 487, S. C., 6 Sup. Ct. Rep., 148. the Supreme Court, affirming the judgment of this Court, held, that a *habeas corpus* proceeding is not removable be-
56 cause the matter in dispute does not involve a money value of five hundred dollars. The case of *Stewart* vs. *Virginia*, 117 U. S., 613, seems also, to be directly in point on this question of money value.

It appears to me that the principle established in the case cited is equally applicable to this case, and that it is not removable on that ground also. But neither is a suit at law, within the meaning of this Act of 1875. The jurisdiction in habeas corpus cases is derived from Section 751, R. S., and not from the sections conferring general jurisdiction. The case must be remanded to the State Court, and it is so ordered.

Endorsed: Read in open Court May 24th, 1886.

L. S. B. SAWYER, Clerk.

Bond on Writ of Error.

57 In the Supreme Court of the United States.

ALBERT S. ROSENBAUM, Plaintiff in Error,
vs.
THE BOARD OF SUPERVISORS of the City and County of San Francisco, Defendant in Error.

Know all men by these presents, that we, M. Lewis and Gustav Sutro, of San Francisco, California, are held and firmly bound unto the Board of Supervisors of the City and County of San Francisco, defendant in error herein, in the sum of five hundred dol-

lars, lawful money of the United States of America, to be paid to the said the Board of Supervisors of the City and County of San Francisco, its successors and assigns. To the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

58 Sealed with our seals. Dated the twenty-ninth day of May, A. D., 1886.

Whereas, the above-named Albert S. Rosenbaum has prosecuted a writ of error to the Supreme Court of the United States to reverse the order and judgment made and rendered by the Circuit Court of the United States, for the District of California, in the cause entitled Albert S. Rosenbaum, plaintiff, *versus* The Board of Supervisors of the City and County of San Francisco, defendant (No. 3,933), remanding said cause to the State Court of the State of California:

Now, therefore, the condition of this obligation is such that if the above-named Albert S. Rosenbaum shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

59 M. LEWIS. [Seal.]
GUSTAV SUTRO. [Seal.]

Signed, sealed and delivered in the presence of Geo. T. Knox.

M. Lewis and Gustav Sutro, being duly sworn, each for himself deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exem t from execution, and over and above all debts and liabilities.

M. LEWIS.
GUSTAV SUTRO.

Subscribed and sworn to before me, this twenty-ninth May, 1886.

[SEAL.] GEO. T. KNOX, *Notary Public.*

60 Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

(Signed,) GEO. M. SABIN,
Judge.

Filed May 29th, 1886.

L. S. B. SAWYER, *Clerk.*

Clerk's Certificate.

62 In the Circuit Court of the United States, for the District of California.

ALBERT S. ROSENBAUM,
Plaintiff,
vs.
THE BOARD OF SUPERVISORS of the City and County of San Francisco,
Defendant.
No. 3,933.

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of California, do hereby certify that the foregoing sixty written pages, numbered from 1 to 60, inclusive, are a full, true and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said Circuit Court, this
61 nineteenth day of August, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

62 UNITED STATES OF AMERICA.—*ss.*

The President of the United States of America to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of California, greeting:

Because in the record and proceedings, and also in the rendition of the order and judgment of a plea which is in the said Circuit Court, before you, between Albert S. Rosenbaum, plaintiff in error, and The Board of Supervisors of the City and County of San Francisco, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are commanded, if judgment be herein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, on the eleventh day of October, 1886, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief Justice of the Supreme Court of the United States, this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON, *Deputy Clerk.*

The above writ of error is hereby allowed.

GEO. M. SABIN,
Dist. Judge, District of Nevada, holding said Circuit Court.

The answer of the Judges of the Circuit Court of the United States, for the District of California:—

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the Supreme Court of the United States,

within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: No. 3933. In the Supreme Court of the United States. A. S. Rosenbaum *vs.* The Board of Supervisors of the City and County of San Francisco. Writ of error. Filed May 29, 1886. L. S. B. Sawyer, Clerk U. S. Circuit Court, District of California, by F. D. Moncton, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA, ss.

To the Board of Supervisors of the City and County of San Francisco, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the eleventh day of October, A. D., 1886, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of California, wherein Albert S. Rosenbaum is plaintiff in error and you are defendant in error, to show cause, if any there be, why the order and judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Sabin, U. S. District Judge for the District of Nevada assigned to hold, and holding Circuit Court of the United States for the District of California, this 2d day of June, A. D. 1886, and of the Independence of the United States, one hundred and tenth.

GEO. M. SABIN,

U. S. District Judge for the District of Nevada, assigned to hold, and holding, Circuit of the United States for the District of California.

Endorsed: Service upon me of a true copy of the within citation, on this 2d day of June, 1886, is hereby admitted.

JOHN L. LOVE,

Attorney for the Defendant in Error.

No. 3,933. In the Supreme Court of the United States, Albert S. Rosenbaum, pl'ff in error, vs. the Board of Supervisors of the City and County of San Francisco, def't in error. Citation. Filed June 2d, 1886. L. S. B. Sawyer, clerk U. S. Circuit Court, District of California. By F. D. Moncton, Deputy Clerk.